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December 3, 2004

VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL SERVICE

South Carolina Public Service Commission

ATTN: Docketing Department

Post Office Drawer 11649

Columbia, South Carolina 29211

RE: Petition to Establish Generic Docket to Consider Amendments
To Interconnection Agreements Resulting from Changes of Law
Docket No. 2004-316-C, Our File No. 803-10271

2004 DEC 3 11:11 AM
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To Whom It May Concern:

Enclosed is the original and ten (10) copies of the **Motion to Dismiss or Hold in Abeyance of KMC, NuVox/NewSouth and Xspedius** in the above-referenced docket.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope. By copy of this letter, I am serving all parties of record and enclose my certificate of service to that effect.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



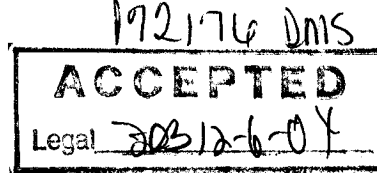
John J. Pringle, Jr.

JJP/cr

cc: John J. Heitmann Esquire
Heather T. Hendrickson, Esquire
Florence Belser, Esquire
all parties of record

Enclosures

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BEFORE THE
SOUTH CAROLINA
PUBLIC SERVICE COMMISSION

In Re:

Generic Proceeding to Examine Issues)	Docket No. 2004-316-C
Related to BellSouth's Obligations to)	
Provide Unbundled Network Elements)	

**MOTION TO DISMISS OR HOLD IN ABEYANCE OF KMC,
NUVOX/NEWSOUTH AND XSPEDIUS¹**

KMC, NuVox/NewSouth, and Xspedius (collectively "Petitioners"), through their undersigned counsel, respectfully move to dismiss or hold in abeyance the recent pleading filed with this Commission by BellSouth Telecommunications, Inc. ("BellSouth") requesting that the Commission establish a generic proceeding to examine issues related to BellSouth's obligations to provide unbundled network elements. As set out herein, BellSouth's Petition has no foundation in federal or state law, and would allow an end-run around the requirement that parties negotiate first and then arbitrate unresolved issues only when parties cannot agree. Additionally, holding a proceeding before the Federal Communication Commission ("FCC") has issued its final rules would be wasteful and inefficient. Further, the timetable discussed for this proceeding will not begin to give the parties sufficient time to frame the issues and develop their positions. **Finally, contrary to BellSouth's assertions, there is simply no hurry to conclude a proceeding by March of 2005.** In support of this Motion, Petitioners would show this Commission the following:

¹ NuVox Communications, Inc. on behalf of its operating entities NuVox Communications, Inc. and NewSouth Communications Corporation (collectively "NuVox/NewSouth"), KMC Telecom V, Inc. and KMC Telecom III, LLC (collectively "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Charleston, LLC, Xspedius Management Co. of Columbia, LLC, Xspedius Management Co. of Greenville, LLC, and Xspedius Management Co. of Spartanburg, LLC (collectively "Xspedius").

BACKGROUND

1. Petitioners and BellSouth were previously before this Commission in a docketed arbitration proceeding (Docket No. 2004-42-C). As contemplated by Sections 251 and 252 of the Communications Act of 1934, as amended ("Federal Act"), Petitioners negotiated with BellSouth for the time period set out in the Federal Act and then sought arbitration of issues that could not be resolved through voluntary negotiation. The parties, through voluntary negotiation, resolved many issues related to BellSouth's obligations to provide unbundled network elements. They were unable to resolve and requested Commission arbitration of others.

2. On July 16, 2004, Petitioners and BellSouth filed with this Commission a Joint Motion to Withdraw Petition for Arbitration ("Motion"). The parties' purpose in seeking permission to withdraw was (and is) to allow the parties to resolve previously identified issues, as well as to negotiate and incorporate issues related to the post-*USTA II*² regulatory framework. In other words, given the post-*USTA II* environment, the parties believed new issues should be incorporated into the arbitration.³

3. On October 6, 2004, the Commission granted the Motion. As stated in the Commission's Order, the parties agreed that they would file any subsequent petition for arbitration within 135 to 160 days of entry of an order granting the Motion. (Petitioners will file a subsequent petition for arbitration during this filing window).

4. Additionally, Petitioners reached an agreement with BellSouth wherein Petitioners would not amend their existing interconnection agreement UNE provisions (Attachment 2) during the pendency of their continued negotiations and subsequent arbitration, but would rather

² *United States Telecom Ass'n v. FCC*, 359 F.3rd 554 (D.C. Circuit 2004).

³ In other states, where the parties' arbitration was simply held in abeyance rather than withdrawn, this process led to the identification of eight new "Supplemental Issues" related to the post-*USTA II* regulatory

operate pursuant to those provisions until the parties were able to move into new interconnection agreements (incorporating the post-*USTA II* regulatory framework) that result from the conclusion of negotiations or arbitration pursuant to a subsequent petition.

ARGUMENTS

NEGOTIATE FIRST, THEN ARBITRATE

5. The Commission must require, as the Federal Act does, that parties negotiate first and arbitrate only if such negotiations fail. Petitioners have followed this principle, in an attempt to eliminate those issues upon which the parties can agree and thus limit what is placed before this Commission for decision. Indeed, BellSouth shared with Petitioners a preliminary version of the matrix it was preparing for this proceeding (it did so with other CLECs as well) and it was immediately apparent that the majority of the issues proposed already were resolved vis-a-vis BellSouth and Petitioners through voluntary negotiations. If these particular issues have been successfully negotiated by the Petitioners, under what rationale should BellSouth have the opportunity to advocate and obtain resolution of those issues before the Commission?

6. The Commission should not encompass certain issues in a generic proceeding that are more likely (as in the case of the Petitioners) to result in negotiated resolution.

7. Additionally, BellSouth's Petition contains certain issues that have never been negotiated by the parties (or shared with the Petitioners prior to BellSouth's filing). Notably, BellSouth filed its proposed contract language in this proceeding *before* it had proposed similar language to the Petitioners as part of their ongoing negotiations. Thus, with respect to the Petitioners, and likely many others, BellSouth's representation that it has been unable to agree on language with many CLECs (BellSouth Petition at para. 8) should certainly have been

framework (and the resolution of numerous other issues bringing the total of unresolved issues to 34 of the original 107 issues).

accompanied by the admission that BellSouth simply had not tried to negotiate with CLECs on certain issues, but instead was trying to avoid statutory and contractual negotiation requirements by going straight to the Commission.

CONCLUDING THIS PROCEEDING BEFORE THE FCC ISSUES FINAL RULES
WOULD BE EXTREMELY INEFFICIENT

8. Parties cannot negotiate (and this Commission cannot arbitrate) with respect to federal law that does not yet exist. It is expected that the FCC will adopt new so-called “final” unbundling rules this month. It is not at all clear what legal requirements will be adopted or whether those requirements will be voluntarily translated into negotiated contract language or whether arbitration issues will result. If past FCC UNE orders serve as any indication, the next one will likely have some aspects that will be voluntarily translated into contract language and others that will result in arbitration issues. The results are likely to vary among CLECs.

9. Expending resources in an attempt to resolve these issues now will be wasteful and inefficient. Parties will need to negotiate after “final” FCC unbundling rules are released and should later proceed with arbitration of unresolved issues. Given the uncertain timing of the release of the FCC's new rules and the uncertain timing of the negotiations process which by its nature involves the exchange of drafts and redlines as well as negotiation sessions, it is all but certain that this process will not be concluded in time for a January hearing.

10. The North Carolina Utilities Commission recently decided to hold a similar Petition filed by BellSouth in abeyance, in part because the FCC had not issued its Final UNE Rules. This Commission should do the same. Indeed, no other state commission has established a

procedural schedule or announced an intention to proceed with the generic proceeding requested by BellSouth in its petitions requesting the same.⁴

11. Interestingly, BellSouth's Petition does not explain *why* "time is of the essence" except by referencing the fact that the Interim Rules issued by the FCC will expire in March 2005 or be supplanted by Final Rules at some point before that date. It is understandable that BellSouth would like the authority to make "automatic" changes to its interconnection agreements, but the Federal Act and the language of the agreements themselves simply do not allow that.

12. Further, BellSouth will not be prejudiced by dismissal of or the holding of this Docket in abeyance. The parties will continue to operate under the interconnection agreements pending some degree of finality from the FCC and the opportunity to negotiate the changes occasioned thereby.

**REQUIRING A FINAL DECISION BY MARCH WOULD PREJUDICE THE
PETITIONERS GREATLY**

13. As set out above, there simply is no rush to conclude this Docket. The Commission is not required to take action before March, nor should it. Doing so, in addition to violating the Act and the language of interconnection agreements, would put substantial procedural pressure on Petitioners and other putative parties in this Docket.

14. First, there simply is not time to conduct this proceeding as a proper arbitration in the time frame proposed by BellSouth. BellSouth's Petition was filed on November 3rd, and the Docket has not yet been formally noticed. BellSouth proposes that a Docket that may affect the

⁴ The Georgia Commission already had opened a generic proceeding regarding BellSouth's unbundling obligations. The Georgia Commission, however, has not ruled on the issues that it may seek to address in that proceeding; nor has it adopted a procedure for doing so.

business plans and operations of all CLECs certified and operating in South Carolina be noticed, heard, and concluded in less than four months.

15. The CLECs have not yet been given the opportunity to respond to the issues as proposed by BellSouth. The Commission cannot presume that the issues as framed and proposed by BellSouth should form the basis of this proceeding. If the Commission is to go forward with this Docket, the Petitioners and other parties must be given the opportunity to create their own issues matrices.

16. As set out above, there may very well be issues upon which Petitioners, other CLECs, and BellSouth may find agreement. As set out above, Petitioners already have reached agreement with BellSouth on many of the issues identified in BellSouth's proposed matrix. In addition, Petitioners are in the process of exchanging language and will soon begin additional negotiations. Petitioners anticipate that this process will continue until and beyond the release of the FCC's so-called final rules. The Commission should dismiss this proceeding and allow the parties the opportunity to engage in negotiations required by the Act and the agreements.

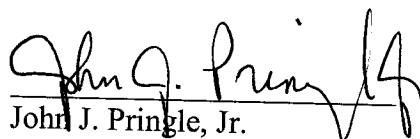
17. However, if the Commission is inclined to move forward, at the very least, a prehearing conference or workshop needs to be held to allow the parties to discuss both a proposed schedule for the proceeding as well as to establish a process for CLEC input to the list of a issues for Commission consideration, as well as with respect to the process that should be adopted to get all of it done.

18. Further, the Office of Regulatory Staff ("ORS") would be a party to this Docket should a hearing take place in 2005. If the hearing is scheduled to take place some time in January (as it must in order for the Commission to hurry out an Order by March 1, 2005), then the ORS, which technically does not obtain the statutory authority to take part in Commission

proceedings until January 1, 2005, would be expected to participate meaningfully in a Docket of great scope and import to telecommunications carriers in South Carolina during the very first days of its existence.

19. There is simply no reason to "hurry the parties to hearing" just because BellSouth is impatient with the Act and the provisions it negotiated with the CLECs. The Commission cannot set this matter for hearing without input from the parties who will be most affected – CLECs like the Petitioners.

In light of the foregoing, Petitioners respectfully oppose BellSouth's petition and request that the Commission deny and dismiss BellSouth's request to establish a generic proceeding, or in the alternative hold this Docket in Abeyance pending the FCC's issuance of Final UNE Rules, and grant such other relief as is just and proper.



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